

Indiana Law Review

Volume 20

1987

Number 4

*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
Philadelphia Newspapers, Inc. v. Hepps,
and Speech on Matters of Public Concern:
New Directions in First Amendment Defamation Law*

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I. INTRODUCTION

Since the United States Supreme Court subjected the common law of defamation to the constraints of the first amendment in *New York Times Co. v. Sullivan*,¹ the Court's decisions in the area have been marked by a continual process of redefinition of the scope and the strength of the "constitutional privilege to defame."² In *New York Times*, the Court held that a public official could not recover damages in a libel action brought against a critic of his official conduct unless he proved, by clear and convincing evidence, "that the statement was made with 'actual malice'—that is, with knowledge that it was false or

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¹376 U.S. 254 (1964). "The Court's consistent view prior to *New York Times Co. v. Sullivan* . . . was that defamatory utterances were wholly unprotected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 384-85 (1974) (White, J., dissenting). See *Roth v. United States*, 354 U.S. 476 (1957); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Near v. Minnesota*, 283 U.S. 697 (1931).

²Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1226 (1976). The central issue in each of the Court's decisions has been the proper balance to be struck between a state's interest in protecting the reputations of its citizens and the freedom of speech guaranteed by the first amendment. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). The resolution of this question, albeit without the first amendment consideration, was not unknown to the common law. See, e.g., Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 215; W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, 772 (5th Ed. 1984) (explanation for anomalies in law of defamation "is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue").

with reckless disregard of whether it was false or not.”³ Three years later, in *Curtis Publishing Co. v. Butts*,⁴ the Court extended the *New York Times* privilege to cases involving defamation of, “public figures”.⁵ A plurality of the Court further extended the privilege in *Rosenbloom v. Metromedia, Inc.*,⁶ to all defamatory speech relating to matters of “public or general concern”,⁷ regardless of whether the plaintiff was a private figure or a public figure. In *Gertz v. Robert Welch, Inc.*,⁸ the Court rejected the *Rosenbloom* subject matter test and held that a “private figure” may constitutionally recover actual damages upon proof of the defendant’s negligence without regard to the nature of the speech at issue.⁹

In two recent decisions the Court has again attempted to accommodate the conflicting interests of reputation and freedom of speech, and in doing so has returned to first amendment defamation law a consideration seemingly discarded in *Gertz*: whether the speech at issue is “of public concern”. The cases are *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹⁰ and *Philadelphia Newspapers, Inc. v. Hepps*.¹¹

II. THE *Dun & Bradstreet* CASE

In *Dun & Bradstreet*, a construction contractor sued Dun & Bradstreet, a credit reporting agency, for falsely reporting that the contractor had filed for bankruptcy. After trial in a Vermont state court, a jury returned a verdict awarding the contractor \$50,000 in compensatory or presumed damages, and \$300,000 in punitive damages. The trial judge, however, granted a new trial, based on his doubts as to the propriety of his charge.¹² The Supreme Court of Vermont reinstated the verdict, based on its view that credit reporting firms such as Dun & Bradstreet are not “the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny,”¹³ and that the *Gertz*

³*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁴388 U.S. 130 (1967).

⁵*See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 n.7 (1974) (*Butts* stands for the principle that the *New York Times* test reaches both public officials and public figures).

⁶403 U.S. 29 (1971).

⁷*Id.* at 44.

⁸418 U.S. 323 (1974).

⁹The Court, however, held that presumed and punitive damages were not allowed, “at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” 418 U.S. at 350. *See infra* note 25.

¹⁰472 U.S. 749 (1985).

¹¹106 S. Ct. 1558 (1986).

¹²*Dun & Bradstreet* argued that the charge permitted the jury to award presumed and punitive damages on less than a finding of knowledge of falsity or reckless disregard for the truth, and that the charge was therefore contrary to the rule established in *Gertz*. 472 U.S. at 752.

¹³143 Vt. 66, 73-74, 461 A.2d 414, 417-18 (1983).

standard of proof regarding presumed and punitive damages was therefore inapplicable.

The United States Supreme Court affirmed the result reached by the Vermont Supreme Court, but not its reasoning. Instead, the Court ignored the media/non-media distinction drawn by the Vermont Supreme Court¹⁴ and held that the *Gertz* limitation on the recovery of presumed and punitive damages to only those plaintiffs proving *New York Times* "malice" does not apply "when the defamatory statements do not involve matters of public concern."¹⁵

Writing for a three-member plurality,¹⁶ Justice Powell reached this conclusion by balancing the state's interest in compensating injury to reputation with the first amendment's interest in protecting freedom of speech. In *Gertz*, this balancing process resulted in a holding that a private plaintiff need only show negligence to recover actual damages. The standard of proof approved in *Gertz* followed from the Court's perception that a state has an increased need to protect the reputation of private plaintiffs who have not "assumed the risk" of defamation by entering the public arena and who have limited ability to rebut false charges against them; the disallowance of presumed or punitive damages upon a mere showing of negligence was based on the perceived need to control "the discretion of juries to award damages where there is no loss"¹⁷ and on the view that presumed and punitive damages are not proper compensation for the actual injury to reputation with which *Gertz* was concerned.¹⁸ Presumed damages, thought by the Court to

¹⁴After hearing the initial arguments, which addressed the propriety of the media/non-media distinction, the Court ordered the parties to address the additional question whether "the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature." 468 U.S. 1214 (1984). See *The Supreme Court*, 1984 Term, 99 HARV. L. REV. 1, 213-14 n.14 (1985).

¹⁵472 U.S. at 763.

¹⁶The opinion was joined by Justices Rehnquist and O'Connor.

¹⁷418 U.S. at 349.

¹⁸The state's interest, Justice Powell wrote, "extends no further than compensation for actual injury." 418 U.S. at 349. The definition of "actual injury" in *Gertz*, however, was not suited to the task of controlling jury discretion and ensuring that only damage to an individual's reputation would be compensated; the Court included "personal humiliation . . . and mental anguish and suffering" in its list of compensable actual injuries. *Id.* at 350. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 367 (Brennan, J., dissenting) (Court's definition in *Gertz* of actual injury "inevitably allow[s] a jury bent on punishing expression of unpopular views a formidable weapon for doing so"); Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 756 (1984). Indeed, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court upheld an award of damages in a case in which the plaintiff had offered no proof of damaged reputation whatsoever, Justice Rehnquist writing:

Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard

allow gratuitous awards of money damages far in excess of any actual injury,¹⁹ and punitive damages, characterized by the Court as “wholly irrelevant” to a state’s interest in compensating injury to one’s reputation,²⁰ were not allowed, “at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”²¹

In *Dun & Bradstreet*, however, Justice Powell’s application of the balancing process resulted in a different outcome. Since Greenmoss Builders, like Elmer Gertz, was a “private figure,” the state’s interest in protecting the reputation of the plaintiff was identical to the state’s interest in *Gertz*.²² But since the speech at issue in *Dun & Bradstreet* was not of public concern,²³ the first amendment interest was “less

to measuring the effect the falsehood may have had upon a plaintiff’s reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing ‘personal humiliation, and mental anguish and suffering’ as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

424 U.S. at 460. See Green, *Political Freedom of the Press and the Libel Problem*, 56 TEX. L. REV. 341, 362-64 (1978); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1437-39 (1975).

¹⁹418 U.S. at 349.

²⁰*Id.* at 350.

²¹*Id.* at 349.

²²472 U.S. at 757.

²³*Id.* at 761-63. One of the reasons given by Justice Powell for giving reduced protection for the speech at issue in *Dun & Bradstreet* was the fact that “the speech is wholly false and clearly damaging to the victim’s business reputation.” 472 U.S. at 762. This sort of reasoning comes close to that about which Justice Powell warned in *Gertz*: “It would undermine the rule of [*New York Times*] to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the [*New York Times* ‘malice’] rule.” 418 U.S. at 331 n.4 (quoting *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 806 (1972)). See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (rejecting “any test of truth” as a requirement for first amendment protection); Wright, *Defamation, Privacy, and the Public’s Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 634-35 (1968):

All too frequently a court’s first step when presented with a defamation or invasion of privacy case is to determine whether the publication in question is true or false. If it is false, the court seems to find the balancing process facilitated, with the remainder of the analysis following as a matter of course. At the heart of this approach is the view that truth is more deserving of protection than falsehood since a lie has no “socially redeeming value”; unlike a true statement, a false one contributes nothing — it may not only lead the hearer astray, but may also retard development of the greater truth

. . . This approach, however, runs afoul of the underlying premises of the first amendment. That amendment affirms the high value placed by the founding fathers on free and unfettered discussion. Yet discussion will surely be inhibited

important than the one weighed in *Gertz*.”²⁴ As a result, the Court held that “the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”²⁵

if the speaker must run the risk that liability will ensue if his statements are subjected to judicial scrutiny Consider how much greater this deterrent will be if the speaker is addressing himself to an area in which there is no agreement on what is the ‘truth.’

²⁴472 U.S. at 758. This determination, of course, implies that the speech involved in *Gertz* was speech of public concern; similarly, in *Philadelphia Newspapers* Justice O’Connor expressed the view that the speech at issue in *Gertz* was of public concern. 106 S.Ct. at 1563. In *Gertz*, however, Justice Powell expressly refused to classify the speech at issue in such terms. 418 U.S. 323, 346 (1974).

²⁵472 U.S. at 761. The argument advanced by Justice Powell in reaching this conclusion is not completely persuasive. Justice Powell wrote in *Dun & Bradstreet* that “[i]n *Gertz*, we found that the state interest in awarding presumed and punitive damages was not ‘substantial’ in view of their effect on speech at the core of First Amendment concern.” 472 U.S. at 760. It seems relatively clear, however, that *Gertz* described as not of substantial state concern the awarding of presumed damages. See 418 U.S. at 349-50. Punitive damages, on the other hand, were described in *Gertz* as being “wholly irrelevant” to a state’s interest in redressing injuries to the reputations of its citizens. *Id.* at 350. And since Justice Powell had conceded that the state’s interest was identical in both cases, it is hard to see how punitive damages were not proper in *Gertz* but were in *Dun & Bradstreet*; as Justice Brennan wrote in dissent, “[w]hat was ‘irrelevant’ in *Gertz* must still be irrelevant” 472 U.S. at 794.

Justice Powell’s response to Justice Brennan’s point was the following:

[T]he dissent finds language in *Gertz* that, it believes, shows the State’s interest to be ‘irrelevant.’ . . . It is then an easy step for the dissent to say that the State’s interest is outweighed by even the reduced First Amendment interest in private speech. *Gertz*, however, did not say that the state interest was ‘irrelevant’ in absolute terms. Indeed, such a statement is belied by *Gertz* itself, for it held that presumed and punitive damages were available under some circumstances. . . . Rather, what the *Gertz* language indicates is that the State’s interest is not substantial relative to the First Amendment interest in *public speech*. This language is thus irrelevant to today’s decision.

Id. at 761 n.7 (emphasis in original).

To this two responses can be made: first, that *Gertz* did not expressly allow recovery of presumed and punitive damages but simply did not rule them out, see 418 U.S. at 349; Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847 n.4 (1985), and second, that the retention in *Gertz* of the possibility of awarding punitive damages, in the context of a decision in which it was stated that the state interest in defamation law “extends no further than compensation for actual injury,” 418 U.S. at 349, and in which it was recognized that punitive damages “are not compensation for injury,” *id.* at 350, reflects a degree of confusion, reference to which may not be too instructive. It should be noted that Justice Rehnquist, writing for the Court in *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), expressed the view that “[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement,” and therefore a state “may rightly employ its libel laws to discourage the deception of its citizens.” *Id.* at 776 (emphasis in original). No such view, however, was expressed in *Gertz*. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-13, 643 (1978) (“*Gertz* Court was explicit in saying that the only legitimate state interest underlying the law of libel is the compensation of individuals for harm to their reputational interest”).

In focusing in *Dun & Bradstreet* on the nature of the speech at issue, Justice Powell appears to have disregarded two concerns he raised in *Gertz*. First, Justice Powell noted the "difficulty" that would be occasioned by "forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not" ²⁶ Second, he expressed doubt as to the "wisdom of committing this task to the conscience of judges." ²⁷ Justice Powell stated in *Dun & Bradstreet* that the Court in *Gertz* held only that "the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern." ²⁸ It is difficult, however, to reconcile such a holding with Justice Powell's strong disapproval in *Gertz* of any judicial attempt to determine the nature of the speech at issue in a defamation action. ²⁹ Indeed, referring to *Gertz* in *Cox Broadcasting Corp. v. Cohn*, ³⁰ Justice Powell wrote of "[t]he Court's abandonment of the '[matter] of general or public interest' standard as the determinative factor for deciding whether to apply the *New York Times* malice standard to defamation litigation brought by private individuals." ³¹ Additionally, Justice Rehnquist, who joined Justice Powell's opinion in *Dun & Bradstreet*, wrote in *Time, Inc. v. Firestone* ³² that the Court in *Gertz* had "eschew[ed] a subject matter test for one focusing upon the character of the defamation plaintiff." ³³

²⁶418 U.S. at 346.

²⁷*Id.*

²⁸472 U.S. at 751.

²⁹This apparent inconsistency was noted in the concurring opinion of Justice White, who wrote: "I had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation . . . whether or not [the statement] implicates a matter of public importance," 472 U.S. at 772, and in the dissenting opinion, wherein Justice Brennan wrote: "One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern. *Gertz* could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach." *Id.* at 785 n.11.

³⁰420 U.S. 469 (1975).

³¹*Id.* at 498 n.2 (Powell, J., concurring) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974)).

³²424 U.S. 448 (1976).

³³*Id.* at 456. If the apparent holding of *Gertz* can so easily change shape, one wonders whether the rest of the opinion can be relied on with any degree of confidence. One part of the opinion that has taken on importance is the paragraph in which Justice Powell wrote that "[u]nder the First Amendment there is no such thing as a false idea." 418 U.S. at 339. This dictum has been taken by a majority of the circuit courts to mean that a statement of opinion can never be actionable in a defamation case. *See, e.g.*, *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); Note, *The Fact-*

Apparent inconsistency aside, it is evident that *Dun & Bradstreet* is an important decision in the Court's ongoing struggle to balance reputational interests with first amendment interests. In the decade following *New York Times Co. v. Sullivan*, the Court issued a series of opinions which consistently increased the protection accorded defendants in defamation actions. In *Garrison v. Louisiana*,³⁴ the Court extended the *New York Times* privilege to cases involving criminal libel; as stated above, in *Curtis Publishing Co. v. Butts*,³⁵ the Court extended the privilege to cases brought by "public figures". In *St. Amant v. Thompson*,³⁶ the Court held that *New York Times* "malice" was not to be found absent a determination that the defendant entertained serious doubts as to the truth of the communication; in *Rosenbloom v. Metromedia, Inc.*,³⁷ the Court applied the privilege in a case involving a private plaintiff. More recently, however, the Court has shown a tendency to restrict the protection accorded defamation defendants. In *Gertz*, for example, the Court narrowly applied the "public figure" test to the facts before it, and held that a private plaintiff needs to show only negligence in order to recover in a defamation case.³⁸ In *Herbert v. Lando*,³⁹ the Court held that the first amendment did not require a privilege against inquiries into the editorial processes of a press defendant in a defamation case. In both *Keeton v. Hustler Magazine*⁴⁰ and *Calder v. Jones*,⁴¹ the Court ruled against defendants who had challenged the jurisdiction of the states in which suit had been brought, and in doing so increased the ability of a defamation plaintiff to sue an out of state publisher in the plaintiff's home state. Now, in *Dun & Bradstreet*, the Court has seized upon a

Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule, 72 GEO. L. J. 1817 (1984). Justices Rehnquist and White, however, have taken the position that the Court in *Gertz* did not intend to supplant the common law and hold that no opinion is actionable. *Miskovsky v. Oklahoma Publishing Co.*, 459 U.S. 923 (1982) (Rehnquist, J., dissenting). See also *Ollman v. Evans*, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting). Support for this position lies in the observation by Professor Anderson that in *Old Dominion Branch 496, Nat'l Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), a case which was decided on the same day as was *Gertz* and in which the speech at issue was arguably a statement of opinion, Justice Powell would have held the defendant liable. See Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 452 n.150 (1975).

³⁴379 U.S. 64 (1964).

³⁵388 U.S. 130 (1967).

³⁶390 U.S. 727 (1968).

³⁷403 U.S. 29 (1971).

³⁸See Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 221-223 (1976).

³⁹441 U.S. 153 (1979).

⁴⁰465 U.S. 770 (1984).

⁴¹465 U.S. 783 (1984).

distinction, the subject matter of the speech at issue, to restrict further the protection given defendants in defamation actions.

The reasoning utilized by Justice Powell in *Dun & Bradstreet* could result in additional limits on the protection afforded defendants in such actions. For example, the Court in future cases could hold that the abolition in *Gertz* of strict liability in defamation actions does not apply where the speech complained of is not of public concern, at least where the plaintiff is a private figure. Justice Powell's opinion in *Dun & Bradstreet* itself has already been interpreted as so holding by a panel of the Fourth Circuit.⁴² Also, Justice White, concurring in *Dun & Bradstreet*, wrote: "Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this."⁴³

Despite the reasoning of the Fourth Circuit panel and Justice White, however, it does not necessarily follow from *Dun & Bradstreet* that the states may now impose strict liability on defendants in defamation actions in which private plaintiffs are complaining of speech not of public concern. Such is the case for at least two reasons. First, one of the bases for the result reached by Justice Powell in *Dun & Bradstreet* was the fear, long expressed in the common law, that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact."⁴⁴ No such serious concern has been expressed, however, either by Justice Powell or in the common law, regarding the burden a defamation plaintiff faces in proving fault on the part of a defendant. If the Court is satisfied that proving negligence on the part of defendants in defamation cases is not an unduly difficult task, then retention by the Court of the *Gertz* prohibition of strict liability in these cases would not be inconsistent with *Dun & Bradstreet*.

Second, it appears that the Court in *Gertz* used different tests to determine the type of damages that should be awarded and the applicable standard of liability. Justice Brennan noted in his dissent in *Dun &*

⁴²*Mutafis v. Erie Insurance Exchange*, 775 F.2d 593 (4th Cir. 1985).

⁴³472 U.S. at 773-74.

⁴⁴*Id.* at 760 (quoting W. PROSSER, *THE LAW OF TORTS* § 112 at 765 (4th Ed. 1971)). See also *id.* at 2951 (White, J., concurring) (Showing of actual damage "a burden traditional libel law considered difficult, if not impossible, to discharge"); 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 5.30 at 468 (1956) ("Actual damage to reputation may be suffered although the plaintiff may be unable to prove it. By the very nature of the harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle").

Bradstreet that the Court in *Gertz* had reached its decision regarding the propriety of presumed and punitive damages by applying an overbreadth analysis, not a balancing test.⁴⁵ The holding in *Gertz* regarding the proper standard of liability, however, was clearly the result of Justice Powell's balancing test and his desire to find an "equitable boundary between the competing concerns" of personal integrity and free expression.⁴⁶ It could be that *Dun & Bradstreet* signals the Court's desire to utilize balancing for both the question of proper damages and the question of the proper standard of liability in defamation cases. On the other hand, if Justice Powell had meant in *Dun & Bradstreet* to abolish the overbreadth analysis of *Gertz* in favor of a balancing test, one would think that he would have expressed his intentions. In sum, it is not clear that the Court has rejected the overbreadth analysis used in *Gertz* to determine the proper damages to be awarded in defamation cases. Therefore, it does not necessarily follow from *Dun & Bradstreet* that the states are now free to impose increased liability on defamation defendants: the Court's adjustment of one analysis would not necessarily affect the other.

If, however, the Fourth Circuit and Justice White are correct, then *Dun & Bradstreet* could mark a significant step in the recent series of Supreme Court opinions reducing the protection given defendants in defamation cases. Indeed, the Court could even use *Dun & Bradstreet* as the basis for eliminating *New York Times* protection for defendants in cases where a public figure or a public official complains of speech adjudged not to be of public concern. In such a case, the weight on both sides of the balance, *i.e.*, the state's interest in protecting the reputation of one who has "assumed the risk" of negative comment by entering the public arena and who presumably has greater than average access to channels of communication through which he can rebut such comment, and the first amendment interest in protecting speech not of public concern, would be reduced. The question would be the relative scope of the reductions, and the outcome could be a requirement that

⁴⁵472 U.S. at 794. Justice Brennan wrote that the Court in *Gertz* had reached its conclusion as to the propriety of awarding presumed and punitive damages "not . . . by weighing the strength of the state interest against strength of the First Amendment interest. Rather, the Court recognized and applied the principle that regulatory measures that chill protected speech be no broader than necessary to serve the legitimate state interest asserted." *Id.* In *Gertz*, Justice Powell had written: "It is . . . appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." 418 U.S. at 349.

⁴⁶418 U.S. at 347-48.

a plaintiff in such a case need only show negligence to recover,⁴⁷ or a rule that a plaintiff in such a case may recover without proving any fault at all on the part of the defendant.⁴⁸

Such a development would be significant, but not surprising. Indeed, Justice Goldberg, who with Justices Douglas and Black was of the opinion that no liability whatsoever could be imposed on one commenting on the public conduct of a public official, distinguished in his concurring opinion in *New York Times* between a defamatory statement concerning a public official's public conduct and one concerning an official's private conduct, stating that the latter "has little to do with the political ends of a self-governing society."⁴⁹ Therefore, wrote Justice Goldberg, "[t]he imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment."⁵⁰ Justice Brennan made substantially the same point in *Rosenbloom v. Metromedia, Inc.*,⁵¹ and the Court in *Monitor Patriot Co. v. Roy*⁵² left open the question "whether there remains some exiguous area of defamation against which a candidate may have full recourse"⁵³ Since the Court is now willing to consider both the nature of the speech and the nature of the plaintiff in defamation cases, this is a question that may soon have to be answered.

An affirmative answer by the Court might have little effect on defamation actions brought by public officials. After establishing the

⁴⁷The writers of the RESTATEMENT have taken the position that a public official or public figure who complains of speech "in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity" need only show negligence on the part of the defendant to recover damages. RESTATEMENT (SECOND) OF TORTS § 580B (1975). This section was written when it appeared from *Gertz* that the Court had rejected the imposition of strict liability on defendants in defamation cases of any sort.

⁴⁸Such a rule would be the converse of *Rosenbloom*: A finding that the speech at issue was not of public concern would make possible the imposition of strict liability on the defendant, whereas in *Rosenbloom* a finding that the speech at issue was of public concern resulted in *New York Times* protection for the defendant. In addition, under such a rule the question whether to impose strict liability on the defendant or grant the defendant *New York Times* protection would rest solely on a determination of the nature of the speech at issue, which is exactly what Justice Powell disapproved of in *Gertz*. 418 U.S. at 346.

⁴⁹376 U.S. at 301 (Goldberg, J., concurring).

⁵⁰*Id.* at 301-02. Judge Wright expressed a similar view: "[W]here the subject matter of the alleged libel against a public official is a private affair, the rule should be different since here the need for free and unfettered discussion is greatly diminished if not non-existent." Wright, *supra* note 23, at 639.

⁵¹Justice Brennan wrote: "[S]ome aspects of the lives of even the most public men fall outside the area of matters of public or general concern." 403 U.S. at 48.

⁵²401 U.S. 265 (1971).

⁵³*Id.* at 275. A candidate for public office is perhaps the least favored libel plaintiff; as Justice Powell wrote in *Monitor Patriot*, "it can hardly be doubted that the constitutional guarantee [of freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 272.

New York Times privilege, the Court was quick to indicate that there would be few cases in which the privilege would not apply where the speech concerned a public official.⁵⁴ In *Garrison v. Louisiana*, for example, the Court reasoned that since “[t]he public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants . . . anything which might touch on an official’s fitness for office is relevant” and therefore protected by the *New York Times* standard of proof.⁵⁵ In *Monitor Patriot*, the Court held “as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official’s or a candidate’s fitness for office for purposes of application of the ‘knowing falsehood or reckless disregard’ rule of *New York Times Co. v. Sullivan*.”⁵⁶

It is more likely that speech concerning some public figures would be considered not to be of public concern. In *Gertz*, the Court identified two types of public figures: one whose fame is so pervasive that he is a public figure “for all purposes and in all contexts,”⁵⁷ and, “[m]ore commonly . . . [one who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”⁵⁸ Although the matter is not free from doubt,⁵⁹

⁵⁴One such case is *Aku v. Lewis*, 52 Haw. 366, 477 P.2d 162 (1970), wherein the Supreme Court of Hawaii wrote that the plaintiff, a police officer, would normally be considered to be a public official, but that since the speech at issue concerned the plaintiff’s involvement as the coach of a youth football team rather than his duties as a police officer, his “activities were not within the purview of [*New York Times* . . .]” 52 Haw. at 375, 477 P.2d at 168.

⁵⁵379 U.S. at 77. *Garrison*, who was the Orleans Parish district attorney, had charged eight judges of the Orleans Parish criminal court with laziness and inefficiency, and had suggested that the judges were subject to “racketeer influences.” *Id.* at 66.

⁵⁶401 U.S. at 277. Such a broad construction of what is of public interest was suggested by Alexander Meiklejohn, who wrote:

In cases of private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation or property may sue for damages. But, in that case, the First Amendment gives no protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen’s participation in government. It is, therefore, protected by the First Amendment.

A. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 259.

The Court’s newfound desire to examine the content, form, and context of speech when deciding whether the speech is of public concern, discussed *infra* notes 79 to 114, could result in a narrower view of what speech is protected by the *New York Times* privilege, even when the speech concerns a public official. See *infra* note 111.

⁵⁷418 U.S. at 351.

⁵⁸*Id.*

⁵⁹See Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 917-19 (1984); Daniels, *Public Figures Revisited*, 25 WM. & MARY L. REV. 957, 962-68 (1984). In *Carson v.*

it appears that members of the first category could include movie stars, athletes, and others whose connection with the affairs of government is minimal. A court could easily conclude that a statement which would be of public concern if made concerning a United States Senator would not be of public concern if made concerning Pee Wee Herman.⁶⁰ As to "limited purpose" public figures, it is apparent that statements concerning issues other than those for which such a person is a public figure could be held not to be of public concern.⁶¹ It is therefore possible that the Court's reinjection into defamation cases of the question whether the speech at issue is of public concern will have an effect on cases involving a variety of issues other than those before the Court in *Dun & Bradstreet*, and if there was any doubt after *Dun & Bradstreet* as to the strength of the Court's renewed interest in testing the nature of the speech at issue in defamation cases, it was likely dispelled by the Court's decision, handed down ten months after *Dun & Bradstreet*, in *Philadelphia Newspapers, Inc. v. Hepps*.⁶²

III. THE *Philadelphia Newspapers* CASE

In *Philadelphia Newspapers*, the principal stockholder of a corporation that franchised convenience stores sued the Philadelphia Inquirer in Pennsylvania state court for defamation, based on a series of articles that suggested that the plaintiff was connected to organized crime and had used his connections to gain favorable treatment for his business from members of the state government. At the close of evidence, the trial judge deemed unconstitutional the Pennsylvania statute which placed on the defendant the burden of proof as to the truth of the publication, and the judge therefore instructed the jury that the plaintiff bore the burden of proof on the issue. The jury awarded no damages, and the plaintiff brought a direct appeal to the Pennsylvania Supreme Court, which held

Allied News Co., 529 F.2d 206 (7th Cir. 1976), the court wrote that Johnny Carson was an all purpose public figure. Carson certainly fits the *Gertz* description of a public figure who has greater than average access to "channels of effective communication" through which to rebut false allegations, 418 U.S. at 344, and who has assumed the risk of negative comment. However, the Court in *Gertz* also noted that public figures "assume special prominence in the resolution of public questions," 418 U.S. at 351, a category into which Carson does not fall so easily.

⁶⁰For example, a charge of laziness or inefficiency on the part of a public official would certainly be more likely to be considered of public concern than the same charge leveled at a movie star.

⁶¹See, e.g., *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985) (air controller public figure only as to discussions of plane crash); *McDowell v. Paiewonsky*, 769 F.2d 942 (3rd Cir. 1985) (architect-engineer public figure only as to issues regarding his work on public building projects).

⁶²106 S. Ct. 1558 (1986).

that the statute was not unconstitutional and remanded the cause for a new trial.⁶³

The United States Supreme Court reversed, in an opinion written by Justice O'Connor and joined by Justices Brennan, Marshall, Blackmun, and Powell. Seeking as always to reach an "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances,"⁶⁴ the Court reaffirmed its position that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters,"⁶⁵ and held that, "at least where a newspaper⁶⁶ publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false."⁶⁷

Thus, as it had in *Dun & Bradstreet*, the Court in *Philadelphia Newspapers* focused on the nature of the speech at issue in resolving the question before it; indeed, Justice O'Connor wrote that the Court's decisions since *New York Times* demonstrated "two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern."⁶⁸ This appears to be a notable departure from the rejection in *Gertz* and subsequent cases of a subject matter test; in fact, Justice O'Connor even suggested in *Philadelphia Newspapers* that the Court's decision in *Gertz* was aimed at providing "'breathing space' . . . for true speech on matters of public concern"⁶⁹

The fact is, of course, that after *Gertz* the Court had applied a test that only took into account the nature of the plaintiff. There is no doubt, however, that Justice O'Connor was correct in suggesting that the desire to protect speech of public concern has been one of the bases of the Court's treatment of defamation cases since *New York Times*.

⁶³506 Pa. 304, 485 A.2d 374 (1984).

⁶⁴106 S. Ct. at 1562 (quoting *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976)).

⁶⁵*Id.* at 1564-65 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1984)).

⁶⁶*See infra* note 78.

⁶⁷106 S. Ct. at 1559. Since public figures always have a heavier burden than do private figures in libel cases, the Court's holding must also apply to public figure plaintiffs. The actual holding in *Philadelphia Newspapers* was not unexpected; as Justice O'Connor noted, the Court had in previous cases indicated that the burden of proof on the issue of truth or falsity should be on the plaintiff, 106 S. Ct. at 1561, 1563, and a number of courts had already shifted the burden of proof on this issue. *See, e.g., Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), *rev'd on other grounds*, 817 F.2d 762 (D.C. Cir. 1987) (en banc); *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), *cert. granted*, 454 U.S. 962 (1981), *cert. dismissed*, 454 U.S. 1130 (1981); *see also Franklin & Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984); Eaton, *supra* note 18 at 1384 n.151.

⁶⁸106 S. Ct. at 1563.

⁶⁹*Id.* at 1565.

The stated purpose of the *New York Times* privilege, and of its extension to cases involving suits brought by public figures, was "to protect speech that matters."⁷⁰ The Court has consistently expressed its view that the speech that matters the most is speech on issues of public concern.⁷¹ Thus, when the Court in *New York Times* prohibited a public official from recovering damages for defamatory speech relating to his official conduct unless he could prove, by clear and convincing evidence, the existence of "malice", it did so to protect "freedom of expression upon public questions"⁷² When the Court extended the *New York Times* rule to suits brought by public figures, it did so because "'public figures,' like 'public officials,' often play an influential role in ordering society," and "freedom of the press to engage in uninhibited debate about their involvement in public issues and events is . . . crucial"⁷³ When the Court subjected candidates for public office to the burden of the *New York Times* rule, it did so because of the need for the

⁷⁰*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Or, in the words of Meiklejohn, to ensure that "everything worth saying shall be said." A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

⁷¹See *New York Times Co. v. Sullivan*, 376 U.S. at 273 (1964) (such speech within "the central meaning of the First Amendment"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (speech on matters of public concern "at the heart of the First Amendment's protection"); *Garrison v. Louisiana*, 379 U.S. at 74-75 ("speech concerning public affairs . . . is the essence of self-government"); *Carey v. Brown*, 447 U.S. 455, 467 (1980) (political discussion occupies "highest rung of the hierarchy of First Amendment values"). See also *Lorain Journal Co. v. Milkovich*, 106 S. Ct. 322, 329 (1985) (Brennan, J., dissenting) (Court's decisions involving the *New York Times* standard "rest at bottom on the need to protect public discussion about matters of legitimate public concern"); *Dun & Bradstreet*, 472 U.S. 749, 756 (1985) (every case in which the Court has placed constitutional limits on state defamation law has involved "expression on a matter of undoubted public concern"); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 40-41 (1983).

⁷²376 U.S. at 269. The Court spoke of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open", and stated that the speech in question, "as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for constitutional protection." *Id.* at 270-71. See also *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("[t]here is a strong interest in debate on public issues . . . and . . . a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues").

⁷³*Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring). Chief Justice Warren also wrote: "In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 163-64.

public to gain full knowledge of the qualifications of those who seek to make public policy.⁷⁴ On the other hand, one of the bases for the Court's refusal to require private plaintiffs to prove *New York Times* "malice" has surely been the Court's view that speech about private figures tends to be of less public importance than speech about public officials and public figures.⁷⁵ This inconsistency, therefore, has not been in the Court's commitment to protecting speech on matters of public concern, but rather in the Court's attempts to secure that protection.⁷⁶

⁷⁴*Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

⁷⁵*See, e.g., Dun & Bradstreet*, 472 U.S. at 780 n.5 (Brennan, J., dissenting) ("Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures"). It may also be that the question of whether speech is of public concern has been a factor in defamation cases involving private plaintiffs, since the general negligence analysis consists of balancing the probability and the gravity of the risk of harm with the utility of the conduct in question. *See* RESTATEMENT (SECOND) OF TORTS § 291 (1965); W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, *supra* note 2, § 31 at 171. The RESTATEMENT takes the position that a defendant speaking on matters of public importance should be less likely to be found negligent than a defendant spreading gossip, since "[i]nforming the public as to a matter of public concern is an important interest in a democracy," whereas the "spreading of mere gossip is of less importance" and therefore requires more care on the part of the speaker. RESTATEMENT, *supra* note 47, § 580B, comment h. *See Smolla*, *supra* note 71, at 81-86. In addition, the *Gertz* "public figure" test, focusing as it does on whether the plaintiff has participated in a "public controversy", has necessitated inquiries which resemble those which had been necessary after *Rosenbloom*, and which seemed to have been repudiated by *Gertz*. *See Eaton*, *supra* note 18, at 1423-24.

⁷⁶An example of this confusion can be found in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In *Gertz* the Court had rejected the application of the *New York Times* rule to cases brought by private figures primarily because private figures have not "assumed the risk" of defamation and because they do not have easy access to channels of rebuttal. In *Firestone*, however, the Court held that the plaintiff, who seemed clearly to have assumed the risk of defamatory comment and to have access to channels of rebuttal, was a private figure because "[s]he assumed no 'special prominence in the resolution of public questions,'" that is, the matter in which the plaintiff was involved, a divorce proceeding, "is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Id.* at 454-55. The Court also stated its view that "the details of many, if not most, courtroom battles would add almost nothing towards advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*." *Id.* at 457. Thus the Court, under the guise of applying a test focusing on the nature of the plaintiff, in fact seemed to have applied a subject matter test. Recognizing this, Justice Marshall wrote:

If there is one thing that is clear from *Gertz*, it is that we explicitly rejected the position of the plurality in *Rosenbloom* . . . that the applicability of the *New York Times* standard depends upon whether the subject matter of a report is a matter of 'public or general concern.' . . . Having thus rejected the appropriateness of judicial inquiry into 'the legitimacy of interest in a particular event or subject,' . . . *Gertz* obviously did not intend to sanction any such inquiry by its use of the term 'public controversy.' Yet that is precisely how I

IV. POTENTIAL REPERCUSSIONS OF *Dun & Bradstreet* AND *Philadelphia Newspapers*

There are aspects of *Dun & Bradstreet* and *Philadelphia Newspapers* that may have the unfortunate effect of increasing this confusion. For example, since the Court now recognizes both a distinction between private and public plaintiffs and a distinction between speech not of public concern and speech of public concern, every defamation case can now be placed in one of four categories. The number of possible categories had previously been limited to two.⁷⁷ Given the difficulty that courts have had with defamation cases to this point, one cannot hold too much hope of clearer and more logical results now that the number of categories into which each defamation case may be placed has been doubled.⁷⁸

Perhaps more troubling than the increased number of categories is the reference in *Dun & Bradstreet* to *Connick v. Myers*⁷⁹ as a guide to

understand the Court's opinion to interpret *Gertz*.

Id. at 488 (Marshall, J., dissenting). See also L. TRIBE, *supra* note 25, § 12-13 at 644-45 (explanation for the result in *Firestone* is that the Court "decided that gossip about the rich and famous is not a matter of legitimate public interest"); Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157 (1977).

⁷⁷Justice O'Connor alluded to three of the four categories in *Philadelphia Newspapers*: When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

106 S.Ct. at 1563.

⁷⁸The problem would be twice as great if the Court distinguished between media and non-media defendants. Following Justice Powell's repeated reference in *Gertz* to the fact that the defendant in that case was a media entity, doubt existed as to whether the *New York Times* privilege applied in suits brought against non-media defendants. See *Robertson*, *supra* note 38, at 215-20; *Eaton*, *supra* note 18, at 1416-18; Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982); RESTATEMENT, *supra* note 47, § 580B comment e. The various opinions in *Dun & Bradstreet* indicated that a majority of the Court rejected this distinction. See 472 U.S. at 773 (White, J., concurring); *id.* at 781-84 (Brennan, J., dissenting); see also *Garcia v. Board of Education*, 777 F.2d 1403 (10th Cir. 1985) (so reading *Dun & Bradstreet*). Strangely enough, however, in *Philadelphia Newspapers* the majority opinion once again stressed the fact that the defendant was a member of the media, and already one court has read *Philadelphia Newspapers* as establishing a special proof requirement for media defendants in defamation cases. See *Lake Shore Investors v. Rite Aid Corp.*, 67 Md. App. 743, 509 A.2d 727 (1986).

⁷⁹461 U.S. 138 (1983).

determining what speech is of public concern. In that case, Myers, an assistant district attorney, had been dismissed after circulating a questionnaire among her fellow employees, seeking their views on office transfer policy, office working conditions, the trustworthiness of certain employees, the existence of political pressures in the office, and the need to establish an office grievance committee.⁸⁰ She sued Connick, the district attorney, claiming that she was fired because she had exercised her right of free speech and that the termination was therefore unconstitutional.

The Court disagreed. The task, wrote Justice White, was to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁸¹ Since the Court found that the questionnaire "touched upon matters of public concern in only a most limited sense . . . [and] is most accurately characterized as an employee grievance concerning internal office policy,"⁸² it held that "[t]he limited First Amendment interest involved . . . does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."⁸³ The termination of Myers, therefore, was not unconstitutional.

Explaining his conclusion that Myers' questionnaire was of limited public concern, Justice White wrote: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."⁸⁴ It is this test that Justice Powell used to determine the nature of the speech at issue in *Dun & Bradstreet*.

It is by no means clear, however, that the Court's analysis in *Connick* is applicable to a defamation case. The Court has to this point given little indication that "speech that matters" might matter less if it is made in a certain way or in a certain context.⁸⁵ It is not immediately apparent how these considerations can affect the proper characterization of the subject matter of a given statement; "[t]he general proposition

⁸⁰*Id.* at 141. Her superiors were apparently of the view that Myers' activities amounted to insubordination and created a "mini-insurrection." *Id.*

⁸¹*Id.* at 142 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

⁸²*Id.* at 154.

⁸³*Id.*

⁸⁴*Id.* at 147-48.

⁸⁵*See* *McDonald v. Smith*, 472 U.S. 479, 490 (1985) (Brennan, J., concurring) ("There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States"); *RESTATEMENT, supra* note 47, § 580A, comment h.

[is] that freedom of expression upon public questions is secured by the First Amendment,"⁸⁶ and it seems that the proper inquiry should focus not upon the circumstances surrounding the making of the speech but rather upon the matters at which the speech is directed.⁸⁷

The inclusion of such considerations in the context of a case dealing with the effect that an employee's speech has on the smooth operation of a workplace is perhaps understandable. The Court in *Connick* stressed its unwillingness to create in the federal courts a massive employment review board and its hesitance to allow "every employment decision [to become] a constitutional matter."⁸⁸ The Court therefore distinguished between cases in which one speaks "as a citizen upon matters of public concern"⁸⁹ and those in which one speaks "as an employee upon matters only of personal interest,"⁹⁰ and held that expressions of the first type are entitled to much greater first amendment protection than are expressions of the second type. Thus it appears that the Court sought in *Connick* to limit the occasions on which an employee could properly claim full first amendment protection for a work-related grievance, evaluating the form and the context of the speech at issue in order to determine whether the statement was made in the speaker's capacity as an employee or as a citizen,⁹¹ and therefore whether or not a constitutional question was raised.

There are a number of problems, however, with applying this sort of analysis to a defamation case. First, the *Connick* test is unclear.⁹² Courts applying *Connick* to determine whether speech is of public concern

⁸⁶New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

⁸⁷See *Connick*, 461 U.S. at 160 (Brennan, J., dissenting) (stating that "whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why"); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 538 n.5 (1980) (when court is asked to determine whether speech is protected by the first amendment, it "must look to the content of the expression"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 67 (1976) ("a common thread which [runs] through all the [Court's defamation] opinions [is] the assumption that the rule to be applied depend[s] on the content of the communication"); Yoggerst v. Hedges, 739 F.2d 293, 296 (7th Cir. 1984) ("While *Connick* mandates that we examine the content, form, and context of speech to determine whether, as a matter of law, it can be characterized as speech on a matter of public concern, we believe that the content factor is most important in making this determination").

⁸⁸461 U.S. at 143.

⁸⁹*Id.* at 147.

⁹⁰*Id.*

⁹¹See *infra* note 103.

⁹²See McKinley v. City of Eloy, 705 F.2d 1110, 1113-14 (9th Cir. 1983) (acknowledging difficulty courts have had in deciding when speech addresses issues of public concern); Zaky v. United States Veterans Administration, 605 F. Supp. 449, 456 (N.D. Ind. 1984), *aff'd*, 793 F.2d 832 (7th Cir. 1986) (complaining of "the confusion inherent in such a nebulous concept" as the *Connick* test).

demonstrate a reluctance to offer much more in the way of reasoning than the conclusory statement that the speech either is or is not of public concern.⁹³ Perhaps this is understandable, given the lack of guidelines in *Connick* itself, and the disagreement between Justices Powell and Brennan in *Connick* as to the proper scope of the category of matters of public concern, a disagreement which continued in *Dun & Bradstreet*. As long as the determination of whether speech is of public concern must be made with a test so vague (and thus manipulable) as is the *Connick* test, the danger exists that confusion, or analysis aimed at a desired result, will prevail.⁹⁴

Also, it is unclear how much weight is to be given each of the three factors—content, form and context—in determining whether the speech at issue is of public concern. In *Connick*, the Court determined that five of the matters covered by Myers' questionnaire were not of public concern, and that one, a question whether office employees felt political pressure from their superiors, was of public concern. Thus, although the "form" and the "context" of the expressions were identical, the "content" of one caused the Court to consider it to be of public concern. Perhaps this means that speech about some subjects is of public concern regardless of any other considerations. Justice White indicated in *Connick* that a protest against racial discrimination is "a matter inherently of public concern."⁹⁵ Does this mean that an employee's speech on this

⁹³In *Philadelphia Newspapers*, for example, Justice O'Connor offered very little explanation for the conclusion that the newspaper articles at issue were of public concern. In his concurring opinion in *Dun & Bradstreet*, Justice White gave no explanation at all for his conclusion that the credit report was not of public concern, and Justice Powell rested his conclusion that the credit report was not of public concern entirely on the fact that the report was "in the individual interest of the speaker and its specific business audience," and that the report was intended for limited distribution. 472 U.S. at 762. Dissenting in *Dun & Bradstreet*, Justice Brennan complained that "the five Members of the Court voting to affirm the damage award . . . have provided almost no guidance as to what constitutes a protected 'matter of public concern.'" 472 U.S. at 786. See also *McPherson v. Rankin*, 786 F.2d 1233 (5th Cir. 1986), *aff'd*, 107 S. Ct. 2891 (1987); *Anderson v. Central Point School Dist.*, 746 F.2d 505 (9th Cir. 1984); *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983).

⁹⁴In *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), Justice Marshall wrote that it would be unwise to establish a general standard by which to judge the statements of public employees, given "the enormous variety of fact situations" which could be presented to the courts by employee discharge cases. *Id.* at 569. Such a case-by-case approach was apparently approved in *Dun & Bradstreet*; responding to the dissent's suggestion that *Dun & Bradstreet* reduced first amendment protection for all credit reporting, Justice Powell wrote that "[t]he protection to be accorded a particular credit report depends on whether the report's 'content, form, and context' indicate that it concerns a public matter." 472 U.S. at 762 n.8. This is noteworthy in light of the fact that in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), Justice Powell had voiced his opposition to such case-by-case analysis, and had written in support of "broad rules of general application." *Id.* at 343-44.

⁹⁵461 U.S. at 148 n.8. See also *Rowland v. Mad River Local School Dist.*, 470 U.S.

issue would be held to be "of public concern" regardless of the circumstances surrounding the speech? If so, what other matters fall into the category of speech inherently of public concern? How does the Court's willingness to consider the form and the context of a statement square with the apparent rejection in *Dun & Bradstreet* of a distinction between media and non-media defendants? And how is the *Connick* analysis, aimed as it is at checking "the disruptive potential of speech,"⁹⁶ relevant to the protection of "uninhibited, robust, and wide-open"⁹⁷ debate which the Court has sought to ensure in previous defamation cases?

In addition, courts applying the *Connick* test display an increased willingness to find that speech is of public concern if it relates to a matter in the news or if it is made to the public at large,⁹⁸ an approach that takes into account the "newsworthiness" of the speech at issue, gives more protection to speech that is "newsworthy" than speech that is not, and thus appears to be contrary to the Court's previously expressed view that such an approach constitutes impermissible content-based regulation.⁹⁹ In *Germann v. City of Kansas City*,¹⁰⁰ for example, a fireman claimed that he had been passed over for promotion because of a letter he had written to the fire chief, copies of which he had sent to various city employees and to the firefighters' union. The letter, which arose out of a conflict between the union and the fire department management over the implementation of a "fire plan", accused the fire chief of "tear[ing]

1009, 1012 (1985) (Brennan, J., dissenting) (gay rights an issue inherently of public concern); *Lewis v. Elliot*, 628 F. Supp. 512, 521 (D.D.C. 1986) (ethics of government employee "quintessentially" matter of public concern). See also *Mahaffey v. Kansas Bd. of Regents*, 562 F. Supp. 887, 890 (D. Kan. 1983) (speech regarding plaintiff's salary increases and perquisites, his position on college organizational chart, and the identity of his superiors addressed topics that were "quintessentially items of individual, rather than public, concern").

⁹⁶*Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1013 n.6 (1985) (Brennan, J., dissenting).

⁹⁷*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁹⁸See *The Supreme Court*, 1982 Term, 97 HARV. L. REV. 70, 171-72 (1983).

⁹⁹See *Regan v. Time, Inc.*, 468 U.S. 641 (1984). Such an approach would certainly seem to be antithetical to the traditional view of a content-neutral first amendment; as Professor Emerson wrote, "a classification that bases the right to first amendment protection on some estimate of how much general interest there is in the communication is surely in conflict with the whole idea of the First Amendment." T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 554 (1970). Justice Brennan, dissenting in *Dun & Bradstreet*, called the view that the limited circulation of an expression might make it less a matter of public concern "dubious on its own terms and flatly inconsistent with our decision in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979)." 472 U.S. at 795 n.18. The Court held in *Givhan* that the first amendment protection accorded the statements of a public employee is not reduced when the employee communicates the views privately rather than publicly. *Givhan*, 439 U.S. at 415-16.

¹⁰⁰776 F.2d 761 (8th Cir. 1985).

the Kansas City fire department to shreds," going back on his word, and having a "pitifully twisted outlook toward the employees of the department" ¹⁰¹ Although the distinction between this speech and that held to involve "mere extensions of [the employee's personnel] dispute" ¹⁰² in *Connick* is not overwhelming, the Eighth Circuit Court of Appeals held that "because appellant's letter concerned implementation of the fire plan during a time of great media attention, it addressed a matter of public concern." ¹⁰³ The Ninth Circuit Court of Appeals, in

¹⁰¹*Id.* at 763.

¹⁰²461 U.S. at 148.

¹⁰³*Germann*, 776 F.2d at 764 n.2. In *Connick*, Justice White indicated that the speech in *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), was of public concern in part because the subject matter of the speech had been carried as a news item by the local radio station, 461 U.S. at 145-46. In *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), upon which *Connick* was based, the Court, in the course of stating that the speech at issue was of public concern, noted that the speech addressed "issues then currently the subject of public attention" *Id.* at 572. See also *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 642 (8th Cir. 1983) (two teachers' speech regarding a fellow teacher's disciplinary methods held to be of public concern in part because the matter had drawn "a considerable amount of press coverage"); *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983) (the fact that school board members had stated their position regarding funding for junior high school track and field in "the only newspaper in town" supported conclusion that issue was of public concern); *Monsanto v. Quinn*, 674 F.2d 990, 997 (3d Cir. 1982) (media coverage of an issue is evidence that matter is of public interest); *Wichert v. Walter*, 606 F. Supp. 1516, 1524 (D.N.J. 1985) (fact that issue "generated a banner headline" in local newspaper indicated that it was of public concern); *Ferrara v. Mills*, 596 F. Supp. 1069, 1074 (S.D. Fla. 1984), *aff'd*, 781 F.2d 1508 (11th Cir. 1986) (whether the subject matter of the speech at issue has drawn press attention is a factor to be considered in deciding whether it is of public concern); *Collins v. Robinson*, 568 F. Supp. 1464, 1468 (E.D. Ark. 1983), *aff'd*, 734 F.2d 1321 (8th Cir. 1984) (speech concerning a matter that was "a spinoff of a crowded and rather tumultuous meeting" was of public concern).

A different approach was taken recently by the Fifth Circuit in *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 948 (1987). In that case a captain on a university police force was fired after notes, which were critical of the chief and which were in the handwriting of the captain, were sent to the chief. The captain filed suit, claiming among other things that his dismissal was in violation of his first amendment rights. The court disagreed. The inquiry, according to the court, was not the "inherent interest or importance of the matters discussed by the employee," for "almost anything that occurs within a public agency could be of concern to the public" *Id.* at 1362. Rather, the proper inquiry was "whether the speech at issue . . . was made primarily in the plaintiff's role as citizen or primarily in his role as employee." *Id.* This approach follows from *Connick*, wherein the Court distinguished situations wherein "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest" 461 U.S. at 138. See also *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (where teacher spoke out on matter of public concern, it was "necessary to regard the teacher as the member of the general public he seeks to be"); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984) (speech was not of public concern where it was "clear from the content of [the] statement that

McKinley v. City of Eloy,¹⁰⁴ held that a police officer's speech regarding police salaries and the working relationship between the police union and city officials was of public concern and placed importance on the fact that the speech "was specifically and purposefully directed to the public both through city council meetings and a television interview."¹⁰⁵ This decision followed from *Connick*, wherein the Supreme Court considered the fact that the employee had not sought to publicize her complaints as a factor in its determination that the speech was of limited public concern.¹⁰⁶

In addition, there seems to be a natural disinclination in cases such as *Connick* to find that the speech at issue is of public concern. As stated above, the Court has expressed its unwillingness to allow every employer-employee dispute to become a constitutional issue.¹⁰⁷ An obvious way to keep this from happening is to find that the speech at issue in a case is not of public concern.¹⁰⁸ Indeed, in *Connick* Justice

[the employer] was speaking in her role as an employee about her personal feelings and not in her role as a citizen on a matter of public concern"). Ironically, therefore, it may be that the *Connick* analysis seeks less to determine the nature of the speech at issue than the nature of the speaker, and that the utility of the *Connick* test for determining whether speech is of public concern is limited.

¹⁰⁴705 F.2d 1110 (9th Cir. 1983).

¹⁰⁵*Id.* at 1115. See also *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 948 (1987) (fact that employee made no effort to communicate to the public was a factor in determination that speech at issue was not of public concern); *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985) (*Connick* test necessitates inquiry into whether the speaker intended to bring matter to the attention of the public); *Zaky v. United States Veteran Administration*, 605 F. Supp. 449, 456 (N.D. Ind. 1984), *aff'd*, 793 F.2d 832 (7th Cir. 1986).

¹⁰⁶461 U.S. at 148. Similarly, in the course of holding that the speech in *Dun & Bradstreet* was not of public concern, Justice Powell emphasized the fact that the speech was aimed at a limited audience. See 472 U.S. at 762.

¹⁰⁷"To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. See *supra* note 88 and accompanying text.

¹⁰⁸Justice Brennan made this point in his dissent in *Connick*:

The Court's adoption of a far narrower conception of what subjects are of public concern seems prompted by its fears that a broader view 'would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.' . . .

. . . .

. . . The proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artificially the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony

White expressed the fear that to hold the speech at issue in that case to be of public concern "would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."¹⁰⁹ The speech was adjudged not to be of public concern and the problem was avoided. One difficulty with this reasoning is that while its application is probably relevant to ensuring that government offices function effectively, it contravenes the very purpose of *New York Times*. To apply *Connick* to defamation cases and hold that "criticism directed at a public official" receives reduced first amendment protection¹¹⁰ completely contradicts *New York Times*, which after all was directed at protecting "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹¹¹ Moreover, courts seeking to avoid becoming deluged with employment review cases will have great incentive to find the speech at issue in the cases before them not to be of public concern, as this would discharge them from having to consider the cases further.¹¹² Reported opinions issued in the three years between *Rosenbloom* and *Gertz* indicate that the courts were quite willing to find that speech was of public concern.¹¹³ The mood of the Supreme Court, however, has clearly changed, and if future cases follow the Court's suggestions as to a restrictive application of the *Connick* analysis, a body of case law narrowly defining what is a matter of public concern will be established, and the protection accorded defendants in defamation cases is likely to decrease.¹¹⁴

sufficient to achieve that end.

461 U.S. at 163 (Brennan, J., dissenting).

Other courts and commentators have also expressed the view that *Connick* represents a restriction of the matters that will be held to be of public concern. See, e.g., *Ferrara v. Mills*, 596 F. Supp. 1069 (S.D. Fla., 1984), *aff'd*, 781 F.2d 1508 (11th Cir. 1986); *Landrum v. Eastern Kentucky Univ.*, 578 F. Supp. 241 (E.D. Ky. 1984); Note, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U. L. REV. 429 (1984).

¹⁰⁹461 U.S. at 149.

¹¹⁰As Justice Brennan pointed out, the speech in *Connick* could certainly have been taken to be an effort at developing information and opinions regarding the performance of the district attorney. 461 U.S. at 163. As such, the speech surely would have been protected under the rationale of *Garrison* and *Monitor Patriot*. See *supra* notes 54-56 and accompanying text. See also *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 948 (1987) (context of criticism directed at chief of university police force indicated that speech was of "wholly intragovernmental concern" and thus not of public concern.) *Id.* at 1363.

¹¹¹376 U.S. at 270.

¹¹²See *infra* note 114.

¹¹³See Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 206 (1976).

¹¹⁴This danger is increased by the misapplication of the *Connick* analysis by some courts. The *Connick* analysis consists of two distinct parts: first, the court determines if

Perhaps this is what the Court had in mind in *Dun & Bradstreet* and *Philadelphia Newspapers*. Some members of the Court have recently expressed increased dissatisfaction with what they perceive to be the excessive amount of protection accorded defendants in defamation cases. For example, in *Dun & Bradstreet* Justice White and Justice Burger advocated overruling *Gertz*, based on their view that *Gertz* made it too difficult for private plaintiffs to protect their reputations. Justice White also wrote that he had "become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation."¹¹⁵ Justice Burger, agreeing with Justice White's opinions as to *New York Times*, expressed the novel view that, in a case to which the *New York Times* "malice" standard applies, the jury should be instructed "that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue."¹¹⁶ More recently Justice Burger, in a dissent from denial of certiorari that was joined by Justice Rehnquist, reaffirmed his view, first expressed in *Dun & Bradstreet*, that *New York Times* "should be reexamined."¹¹⁷

the speech at issue is of public concern; second, and only if the speech is determined to be of public concern, the court balances the employee's right to speak with the employer's interest in running an efficient and harmonious workplace. Some courts, however, have combined the two parts, and have considered the disruptive nature of the speech at issue in the course of determining whether it is of public concern. See, e.g., *Zaky v. United States Veterans Administration*, 793 F.2d 832 (7th Cir. 1986); *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1984); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640 (8th Cir. 1983); *Landrum v. Eastern Kentucky Univ.*, 578 F. Supp. 241 (E.D. Ky. 1984). If courts deciding cases involving disruptive speech feel that they must rule that the speech is not of public concern in order to find for the employer, then once again the danger exists that precedent will develop defining narrowly what matters are of public concern.

¹¹⁵472 U.S. at 767.

¹¹⁶*Id.* at 764.

¹¹⁷*Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 106 S. Ct. 2927 (1986). Although his views on these issues are not known, Justice Scalia has demonstrated a tendency to decide against defendants in defamation cases. In *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *rev'd*, 106 S. Ct. 2505 (1986), then-Judge Scalia wrote an opinion holding that the rule requiring clear and convincing evidence of *New York Times* "malice" did not apply at the summary judgment stage of a lawsuit, a decision that was reversed by the Supreme Court. In *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985), he dissented from the majority's characterization of one of the statements in the case as being a constitutionally protected expression of opinion, calling the speech a "classic and coolly crafted libel." 750 F.2d at 1036. In *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), *rev'd*, 817 F.2d 762 (D.C. Cir. 1987) (en banc), he was in the majority reversing, as to some defendants, a judgment notwithstanding the verdict that the district court had entered in the defendants' favor.

The effect of *Gertz* was to place constitutional limits on all defamation actions. Thus a private figure complaining of speech completely unrelated to the goal of *New York Times*, that is, a citizenry informed as to the affairs of government, had at minimum to show fault on the part of the defendant. A public figure or public official complaining of such speech had to show *New York Times* "malice". In addition, such a public figure could be one far removed from the archetypical public figure, involved in the resolution of public questions, whose presence in *Butts* prompted the Court to extend the *New York Times* privilege beyond public officials;¹¹⁸ a public figure could include a weight-lifting coach,¹¹⁹ a bellydancer,¹²⁰ or a sports agent.¹²¹ Perhaps the Court has decided to put a stop to the gradual expansion that has seen the *New York Times* privilege applied to cases involving issues other than those which formed the basis for the development of the privilege. As Justice Rehnquist wrote in *Bose Corporation v. Consumers Union of United States, Inc.*,¹²² "[i]t is ironic . . . that a constitutional principle which originated . . . because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loudspeaker system."¹²³ An analysis which tests the nature of the speech in defamation cases may provide the Court with a tool with which to sharpen the analysis in these cases and make certain that constitutional protection is not applied in cases unrelated to the goals of *New York Times*. It bears repeating that in *Philadelphia Newspapers* Justice O'Connor wrote that "the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape" where a private figure complains of speech of private concern.¹²⁴ One wonders, however, at what price a more precise analysis will be obtained.

¹¹⁸"Butts was the athletic director of the University of Georgia and had overall responsibility for the administration of its athletic program." 388 U.S. at 135. *Butts* was decided with *Associated Press v. Walker*, 388 U.S. 130 (1967), in which the plaintiff was a retired general who had been actively involved in issues relating to federal efforts to desegregate southern schools. Both plaintiffs, therefore, fit well into the rationale given by Chief Justice Warren for extending the *New York Times* privilege to public figures, who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 163-64. (Warren, C.J., concurring). See Schauer, *supra* note 59, at 914-17; Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 287-90.

¹¹⁹*Hoffman v. Washington Post Co.*, 433 F. Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978).

¹²⁰*James v. Gannett Co., Inc.*, 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976).

¹²¹*Woy v. Turner*, 573 F. Supp. 35 (N.D. Ga. 1983).

¹²²466 U.S. 485 (1984).

¹²³*Id.* at 515.

¹²⁴106 S. Ct. at 1563.

V. CONCLUSION

Uncertainty has attended first amendment defamation law since *New York Times*, but *Gertz* had seemed to settle a number of questions and had been reliable authority in the area for over a decade. Now the Court has injected a new set of questions and considerations into defamation cases, and the law is once more in transition. Moreover, the vital question posed in *Dun & Bradstreet*, what constitutes speech on a matter of public concern, may prove to be very difficult to answer correctly. Courts applying *Connick* have often used improper considerations in deciding whether or not speech is of public concern, and the *Connick* analysis itself seems ill-suited to producing a definition of speech of public concern that is consistent with the purposes of *New York Times*. More importantly, the Supreme Court has not promulgated any guidelines to aid lower courts and litigants in seeking to determine whether speech is of public concern. Indeed, it may be that Justice Powell was correct when he wrote in *Gertz* that the question is just too difficult to handle.¹²⁵ The courts and commentators have over the years suggested various answers, without arriving at anything resembling a consensus.¹²⁶ Perhaps the Court is to be commended for its willingness

¹²⁵See *supra* notes 26-29 and accompanying text. Justice Powell's statement was criticized by Justice Brennan, who wrote:

I reject the argument that my *Rosenbloom* view improperly commits to judges the task of determining what is and what is not an issue of 'general or public interest.' I noted in *Rosenbloom* that this task would not always be easy. . . .

But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty.

418 U.S. at 368-69 (Brennan, J., dissenting). See BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 357-58 (1978) (Court's decisions in obscenity cases have required line-drawing at least as difficult as that involved in deciding whether speech is of public concern).

¹²⁶See T. Emerson, *supra* note 99 at 541 ("Efforts to define the concept 'public issue' in the field of libel law have been . . . fruitless"). Perhaps the most well-known attempt at an answer is that of Alexander Meiklejohn. Meiklejohn's theory, grounded on "the basic American agreement that public issues shall be decided by universal suffrage," is that the first amendment grants absolute protection to all speech which citizens need to hear so that they may properly govern themselves. A. MEIKLEJOHN, *supra* note 70 at 27. This "public speech," Meiklejohn wrote, is that "which bears, directly or indirectly, upon issues with which voters have to deal" *Id.* at 94. Meiklejohn described as having "governing importance" education in all its phases, the achievements of philosophy and the sciences, and literature and the arts. A. MEIKLEJOHN, *supra* note 56 at 257. Professor Chafee was of the view that the line that Meiklejohn had drawn between public speech and private speech was "extremely blurred," Chafee, *Book Review*, 62 HARV. L. REV. 891, 899 (1949), and Professor Emerson concluded that Meiklejohn had failed to provide a satisfactory definition of public speech. Emerson, *supra* note 99, at 541. Judge Bork, while agreeing with Meiklejohn that the first amendment only protects speech of governing importance, offered a narrower definition of that speech than did Meiklejohn; in Bork's

to try to find the answer. As it stands now, however, the Court's latest

view, only "explicitly and predominantly political speech" enjoys first amendment protection. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. J.* 1, 26 (1971).

Meiklejohn's concerns echo those expressed in colonial times by William Bolland and James Alexander, who, according to Professor Levy,

stressed the necessity and right of the people to be informed of the conduct of their governors so as to shape their own judgments on "Publick Matters" and be qualified to chose [sic] their representatives wisely. No one before had related the electoral process to freedom of expression—a significant advance in political and libertarian theory. The first essayist [Alexander], in depicting the wholesome influence of liberty of the press upon the formation of public opinion, also propounded the novel thesis that the "Bulk of Mankind" were quite capable of governing themselves The second essayist, in championing the "salutary effects" of "Freedom of Debate," wisely suggested that the public should be exposed to every kind of controversy, in philosophy, history, science, religion, and literature, as well as in politics, because in the course of "examining, comparing, forming opinions, defending them, and sometimes recanting them," the public would acquire a "Readiness of Judgment and Passion for Truth."

L. LEVY, *LEGACY OF SUPPRESSION* 137-38 (1960). Similarly, the members of the Continental Congress expressed the view that a free press was vital to "the advancement of truth, science, morality and arts in general." I *JOURNALS OF CONGRESS* 57 (1800).

Dean Prosser defined matters of public concern as "those matters which are of legitimate concern to the community as a whole because they materially affect the interests of all the community." W. PROSSER, *THE LAW OF TORTS* § 110 at 812 (3rd. Ed. 1964). Professor Pedrick was of the view that the category included "all those matters as to which there is some element of public participation." Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 *CORN. L. Q.* 581, 592 (1964). The RESTATEMENT stated that

[t]ypical facts which, as matters of public concern, may be commented upon . . . are the public acts and qualifications of public officers and candidates for office . . . the management of educational, charitable and religious institutions . . . literary, artistic and scientific productions . . . and the conduct of persons who, by special appeal or otherwise, have offered their conduct or product to the public for approval"

RESTATEMENT OF TORTS § 606 comment a (1938). Dean Green declined to venture a definition, writing that "the term . . . is not definable except in the ultimate determination in the decision of the majority of the judges who have the jurisdictional power to make the decision in a particular case." Green, *supra* note 18 at 352-53 n.47.

Members of the Court have expressed their views on the matter as well. In *Thornhill v. Alabama*, 310 U.S. 88 (1940), Justice Murphy wrote that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* at 102. Justice Douglas expressed the view that freedom of speech should apply to speech "at the lower levels of science, the humanities, the professions, agriculture, and the like," *Rosenblatt v. Baer*, 383 U.S. 75, 90 (1966) (Douglas, J., dissenting). Justice Douglas further wrote that "'public affairs' includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357-58 n.6 (Douglas, J., dissenting). In *Time, Inc. v.*

foray into first amendment defamation law seems to have resulted in more problems than solutions.

Hill, 385 U.S. 374 (1967), Justice Brennan expressed the view that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs," and stated that the Court had "no doubt" that the opening of a new play was a matter of public interest. *Id.* at 388. Justice Marshall, however, felt that courts should not be in the business of passing "on the legitimacy of interest in a particular event or subject; what information is relevant to self-government," since "all human events are arguably within the area of 'public or general concern.'" *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting).